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931394 MAR 1 1994

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a single-member, multi-district reapportionment plan immune from a challenge under §2 of the Voting Rights Act simply because the plan provides African Americans with a "proportional" number of districts in the jurisdiction as a whole?

2. Does a minority group's "proportional representation" bar its §2 claim that district boundaries were purposefully manipulated to dilute and minimize its voting strength, to maximize the voting strength of the majority group, and to "maintain[ ] the reelection chances of white incumbents?"

3. If a minority group's "proportional representation" does defeat its §2 challenge to a single-member, multi-district plan, is such representation measured by the minority group's share of the jurisdiction's voting-age population or by its share of the total population?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings in the United States Court of Appeals for the Eighth Circuit were petitioners Sharon Tyus; Freeman Bosley, Sr.; Bertha Mitchell; Irving Clay, Jr.; and Claude Taylor; and respondents Thomas A. Villa, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; Vincent C. Schoemehl, in his capacity as Mayor, City of St. Louis, Missouri; Board of Aldermen, City of St. Louis, Missouri; and City of St. Louis, Missouri.

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FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

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PETITION FOR WRIT OF CERTIORARI

Sharon Tyus, Freeman Bosley, Sr., Bertha Mitchell, Irving Clay, Jr. and Claude Taylor respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit together with the Court of Appeals' order denying petitioners' suggestion for rehearing *en banc* and the written dissent to that order by Judge McMillian, are reported at 999 F.2d 1301 and appear in Appendix A ("App. A") to this petition. The opinions of the District Court for the Eastern District of Missouri granting defendants' Motion for Summary Judgment and denying plaintiffs' Rule 59(e) Motion to Alter or Amend are unpublished and appear as Appendices B and C, respectfully.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on August 4, 1993. Appellants were granted an extension to August 31, 1993 to file for rehearing. On August 30, 1993, appellants timely filed their petition for rehearing with suggestions for rehearing *en banc*. On November 1, 1993, one judge dissenting, the Court of Appeals denied both petitioners' suggestions for rehearing *en banc* and their petition for rehearing. On January 25, 1994 and again on February 8, 1994, this Court extended the filing date to March 1, 1994. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves §2 of the Voting Rights Act, as amended, 42 U.S.C. §1973. The relevant portion of the statute appears at Appendix D.

STATEMENT OF THE CASE

1. Statement of the Facts.

Petitioners are residents and voters in the City of St. Louis. By its charter, the defendant St. Louis Board of Aldermen was required in 1991 to redraw the aldermanic boundaries in accordance with decennial census figures (Art. I, §3). According to the 1990 census, St. Louis was 50.2% white, 47.4% African American, and 2.5% Hispanic and other minorities.[1] The city's voting-age population was 55% white, 42.6% African American, and 2.4% Hispanic and others (159-210). This population is strikingly segregated. Over 90% of the white population in St. Louis is located on the city's south side and north along the Mississippi River to the city's northern end, while over 90% of the African American population is concentrated on the city's north side, and west of the river front. A continuous boundary can be drawn to encapsulate each community (73-83; 159-210; 211).

At the time the redistricting began, using the 1990 census data and the 1981 ward boundaries, the African American population had grown to a majority status of 59.6% or more in 13 of the city's 28 wards and a plurality of 48.8% in a 14th Ward. The white community had contracted to a majority status of 58% or more in 13 wards and a plurality of 49.8% in a 14th Ward (169-70). When the Board of Aldermen began to redistrict the city, there were 17 white incumbent aldermen and 11 African American incumbent

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[1] According to the Census Bureau's adjusted post-enumeration figures, St. Louis is 48.9% white, 48.5% African American, and 2.5% Hispanic and other minorities (168). Citations are to the pages of the record appendix filed with the Eighth Circuit.

aldermen, and there was a white mayor (63-7).[2]

During the redistricting process, the African American aldermen proposed a plan that provided for 14 wards in which African Americans could elect the candidates of their choice and 14 wards in which whites could elect their preferred candidates (89). The proposal was rejected by the majority aldermen, who instead adopted a map that provided for 16 wards in which whites have a voting-age majority and can elect their candidate of choice, 11 wards in which African Americans have a voting-age majority and can elect their candidate of choice, and 1 ward (the 2nd) in which African Americans have a 59.4% voting-age majority but, eight months earlier, with similar population figures, the African American community was unable to elect its candidate of choice in a head-to-head bi-racial election (62-7; 151-52; 169-70; 122).

2. The Proceedings Below.

In January, 1992, plaintiffs challenged St. Louis' 1991 Ward map as a race-based redistricting whose ward boundaries were manipulated with the purpose and effect of diluting or minimizing the electoral potential of the city's African American population while maximizing the voting strength of the white population, in violation of §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to the United States Constitution (1-18).[3]

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[2] In February, 1993, while the appeal was pending, in a four candidate primary, the white incumbent was defeated and an African American won the democratic nomination for mayor. In April, the African American democratic nominee won the general election.

[3] In their complaint, plaintiffs alleged a one-person, one-vote claim under the 14th Amendment together with a vote dilution or racial gerrymander claim under §2 of the Voting Rights Act and the 14th and 15th Amendments. The trial court rejected

(continued...)

Specifically, plaintiffs alleged that boundaries were manipulated to fracture or "fragment[ ] a geographically compact group of black voters" which would have supported "one or more [additional] wards without such fragmentation," and to "reduc[e] the number of black persons residing in [specific] wards" (12). According to plaintiffs' complaint, if the boundaries had been drawn "fairly and without discriminatory effect, blacks would constitute an effective voting majority in at least 14 out of the 28 aldermanic wards" (10). Instead, the 1991 Map provided African Americans with a voting-age majority in only 12 wards, and an effective voting majority in only 11 wards.[4] Plaintiffs also alleged that defendants drew the map with "[t]he purpose to deny or abridge the [voting] rights of blacks on account of race or color" (10).

Defendants filed an answer[5] and then promptly moved for summary judgment. The single ground for their motion

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[3] (...continued)
plaintiffs' one-person, one-vote claim and treated plaintiffs' vote dilution and/or racial gerrymander claims under §2 and not the Constitution. On appeal, plaintiffs argued both their "results" and their "intent" claims under §2 only. They did not appeal the one-person, one-vote ruling.

[4] Plaintiffs further alleged that (a) the African American population was sufficiently large and geographically compact to support 2 or 3 additional wards in which it could elect its preferred candidates; (b) African Americans in St. Louis are politically cohesive; and (c) the African-American population in St. Louis is subject to racial bloc voting against candidates preferred by African Americans (9-11). Plaintiffs also alleged the presence of the continuing burdens of past discrimination in voting rights, housing and employment, all of which inhibit the ability of African Americans to participate in the electoral process and to elect candidates of their choice (9).

[5] In their answer, defendants admit that there is ample African American population for 14 wards (22); that voting in portions of St. Louis is racially polarized (22-3); and that St. Louis has a long history of private and public racial discrimination (22).

was that the 1991 map provides African Americans with the possibility of obtaining proportional representation measured by their percentage of voting-age population; that is, African Americans, who comprise 47.4% of the city's total population but only 42.6% of its voting-age population, have the possibility of electing their preferred candidates in 12 (42.8%) wards. In addition, defendants argued that St. Louis ward maps have provided the city's African American population with "proportional representation", as measured by voting-age population, for the past two decades (32).

In plaintiffs' response, their expert disputed both the manner in which defendants measured potential African American voting strength under the new map, as well as defendants' assertion that proportional representation had been previously achieved in St. Louis.[6] Plaintiffs argued that because St. Louis is required to redistrict on the basis of total population, total African American population and not African American voting-age population must be used

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[6] First, plaintiffs pointed out that defendants own chart showed that St. Louis' African American community has never attained proportional representation on the city's Board of Aldermen, even under a voting-age population measure (62, 212). Second, plaintiffs challenged the manner in which defendants' expert arrived at his conclusions, given that he performed no independent analysis of voting behavior in St. Louis, and relied solely on "the generally accepted" rule of thumb that defines a "safe" ward at 65% of total population or 60% of voting-age population and on figures presented in an article which was not included in his affidavit (32). Third, defendants' expert counted the city's 2nd Ward as an African American ward in concluding that the 1991 map provides for "proportional representation", despite the fact that in 1991, when the 2nd ward had a 58.4% African American voting-age majority, the white incumbent defeated an African American rival in a biracial election highlighted by low African American participation and severe racial bloc voting (62-7; 151-2; 169-70; 122). Plaintiffs argued below that these facts demonstrated the need for a thorough analysis of voting behavior within the Second Ward before it can be characterized as an African American ward. *See Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993).

to determine whether African Americans have "proportional representation" (90-1). Utilizing this traditional yardstick, the 1991 map provided African Americans with a voting-age majority in 42.8% of the wards or an "effective majority" in only 39.2% of the wards, while African Americans' percentage of St. Louis' total population is 47.4%, a ratio well short of "proportional representation."

Plaintiffs' expert went on to detail the manner in which the 1991 ward boundaries were selectively manipulated to (a) reduce African American population in wards that had become majority or plurality African American over the past decade; (b) fracture African American population; and (c) maximize white voting strength in the five wards within St. Louis' central corridor, thereby "maintaining the re-election chances of white incumbents" (88-9). Plaintiffs argued that such evidence of racial gerrymandering to minimize African American voting strength and to maximize white voting strength should be sufficient to take the case to trial, irrespective of the court's findings regarding proportional representation.

3. The Lower Courts' Opinions.

a. The District Court. The district court granted summary judgment to defendants. In doing so, the Court made no reference to plaintiffs' undisputed evidence that the ward boundaries were manipulated to dilute or cancel out minority voting strength and that, if the boundaries had been drawn in a non-discriminatory manner, there would be at least two more compact African American wards and fewer white wards. Instead, the court focused exclusively on the issue of whether the map provided St. Louis' African American population with proportional representation, citing *Thornburg v. Gingles*, 478 U.S. 30 (1986), for the proposition that once a minority group's electoral success reaches "proportional representation [it] bars a section 2 claim" (App. B-8).

The court also concluded that "proportional representation" should be measured by the minority group's percentage of the voting-age population, and not by the group's percentage in the total population (App. B-9). In addition, the court accepted defendants' assertion that the 1991 map provides African Americans with 12 wards—proportional representation when measured against African Americans' voting-age population—and that St. Louis' aldermanic maps had provided African Americans with such "proportional representation" for the past two decades (App. B-8). Rejecting plaintiffs' claim that, in the single-member, multi-district context, boundary manipulation should at the very least constitute a special circumstance that can demonstrate that this sustained proportional representation "does not accurately reflect the minority's ability to elect its preferred representatives," the court concluded that "the sustained electoral success of African American candidates [in St. Louis] defeats plaintiffs' claim" (App. B-9).

b. The Proceedings In the Eighth Circuit. On November 30, 1992, petitioners appealed the district court's ruling. The briefing was completed on March 17, 1993, and the appeal was argued on May 12, 1993. On August 4, 1993, the panel issued an order finding "no error of law or clearly erroneous findings of fact in the district court's well-reasoned memorandum," and affirming the judgment of the district court[7] (App. A-3).

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[7] Between March 2, 1993 and June 28, 1993, while the appeal was pending, this Court issued three opinions and an order in which it began to articulate the appropriate framework for analyzing voting rights challenges to single-member, multi-district plans like that in St. Louis. *Growe v. Emison*, 113 S.Ct. 1075 (1993); *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); *Shaw v. Reno*, 113 S.Ct. 2819 (1993); and *Campbell v. Theodore*, 113 S.Ct. 2954 (1993). On July 15, 1993, petitioners moved for a supplemental briefing schedule to address this new Supreme Court authority

(continued...)

On August 31, 1993, petitioners filed a suggestion for a rehearing *en banc*. The petition was denied on November 1, 1993, without opinion. Judge McMillian filed a written dissent, criticizing the court's handling of the case:

> This case raises important legal and factual issues under the Voting Rights Act. In my view, genuine issues of material fact exist making this case wholly unsuited for summary judgment. The district court gave no consideration to, and made no findings concerning, serious allegations and evidence of a violation of §2 of the Voting Rights Act. In particular, I believe the district court should have made detailed findings regarding whether the City of St. Louis intentionally created its aldermanic districts to dilute African American voting strength in violation of Section 2.

(App. A-3-4).

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS' DECISION THAT "PROPORTIONAL REPRESENTATION" BARS A §2 CHALLENGE TO A SINGLE-MEMBER DISTRICT PLAN CONFLICTS WITH THIS COURT'S DECISIONS IN *GINGLES* AND *VOINOVICH* AND PRESENTS AN UNSETTLED ISSUE OF GREAT PUBLIC IMPORTANCE THAT REQUIRES CLARIFICATION BY THIS COURT.

This case presents an issue of fundamental importance to the continued vitality of the Voting Rights Act. The lower court held that where a redistricting plan provides a minority group with the potential for sustained proportional representation, the requirements of the Voting Rights Act are

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[7] (...continued)
which directly conflicts with the analytic framework adopted by the district court. The panel denied petitioners' motion as moot (App. A-1).

satisfied, irrespective of undisputed evidence that the single-member district boundaries have been blatantly manipulated to advantage white over African American voters. The lower court based its conclusion on its interpretation of this Court's opinion in *Thornburg v. Gingles*, *supra*, which, according to the lower court, makes proportional representation an absolute bar to any §2 claim.

The lower court's holding fundamentally misreads this Court's voting rights jurisprudence, and sets a dangerous precedent for the adjudication of §2 challenges to single-member district plans. In *Voinovich v. Quilter*, *supra*, this Court observed that the manipulation of ward boundaries is the standard device by which to minimize or cancel out minority voting strength in single-member district plans. Such racial gerrymandering to prefer one race of voters over another can occur even where the gerrymander provides minority voters with rough "proportional representation" as measured by voting-age population.

Despite *Voinovich*, lower courts continue to struggle with this issue of how to reconcile challenges to single-member district plans with the emphasis on proportional representation contained in the closing section of the majority opinion in *Gingles*. This confusion has resulted in a number of inconsistent rulings. For example, in *Weatherall v. DeGrandy*, 794 F.Supp. 1076 (N.D.Fla. 1992) (three-judge court), jurisdiction noted, *sub nom. DeGrandy v. Johnson*, 113 S.Ct. 1249 (1993), the court did not apply a proportional representation analysis to a challenged single-member district plan. *See also Jeffers v. Clinton*, 730 F.Supp. 196 (E.D. Ark. 1989), *aff'd*, 498 U.S. 1019 (1991). On the other hand, a trial judge in *Barnett v. Daley*, 835 F.Supp. 1063, 1066 (N.D. Ill. 1993) relied upon the present action together with this Court's opinion in *Gingles* for its conclusion that, as a matter of law, proportional representation bars a voting rights claim under §2 and under the 14th or 15th Amend-

ments. *See also Nash v. Blunt*, 797 F.Supp. 1488 (W.D. Mo. 1992) (three-judge court), *aff'd*, 113 S.Ct. 1809 (1992) (court applied *Gingles*' proportional representation analysis to a single-member district plan.)

In a slightly different context, the three-judge court in *Rural West Tennessee African American Affair Council v. McWherter*, 836 F.Supp. 453 (W.D. Tenn. 1993) applied a traditional "totality of the circumstances" analysis to the 1991 Tennessee legislative map and found that it discriminated against African Americans by packing them into two districts in Shelby County, Tennessee and by fracturing them among four districts in a neighboring rural part of the state. The court concluded that an additional African American district could have been drawn in each area. The court ruled, nevertheless, that a remedy of one more district was sufficient in as much as it would provide African Americans with proportional representation as measured by their percentage of the voting-age population. In other words, the court held that despite a finding of actual dilution two areas, proportional representation analysis permitted vote dilution in one of these areas to go unremedied.

This case presents the Court with the opportunity to clarify the appropriate analytical framework for evaluating the increasing number of challenges to single-member district plans.

A. In *Gingles*, this Court articulated a clear analytical framework for vote dilution claims in the multi-member district context, while recognizing that a different analysis might apply to single-member district plans.

In *Gingles*, this Court stated that the essence of a §2 claim is that based on the "totality of the circumstances,"

> a certain electoral law, practice or structure interacts with social and historical conditions to cause *inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.*

478 U.S. at 47 (Emphasis added); *Voinovich*, 113 S.Ct. at 1155 (single-member district plan). In *Gingles*, and subsequently in *Voinovich*, this Court identified three preconditions to any vote dilution "effects" claim: (a) a sufficiently large and geographically-compact minority community that can support additional single-member districts; (b) a politically cohesive minority community; and (c) racial bloc voting. *Gingles*, 478 U.S. at 50-51; *Voinovich*, 113 S.Ct. at 1157. Once plaintiffs have satisfied this threshold showing, as petitioners have done here, they must provide evidence of those additional factors that tend to show that the challenged electoral practice causes an inequality in the opportunity of African American and white voters to elect their preferred candidates. According to this Court, these factors, which are listed in the Senate Report accompanying the Amendment to §2, are supportive, but not essential to, a minority voter's claim. *Gingles*, 478 U.S. at 45. Moreover, failure "to establish any particular factor is not rebuttal evidence of non-dilution." S.Rep. at 29 n. 118.

In *Gingles*, this Court held that in the *multi-member and/or at-large district context*, "the extent to which minority group members have been elected to public office in the jurisdiction" is the single most important additional factor for courts to consider once the three preconditions are met. More precisely, a majority of the Court concluded that a minority's proportional electoral success in a specific multi-member district could defeat a minority's §2 claim if it was sustained over a number of elections. According to a majority of the Court, such sustained proportional representation is "inconsistent" with a claim of vote dilution in the multi-member context. *Id.* at 76-77.

This Court refused to say that even sustained electoral success was an absolute bar to vote dilution challenges to multi-member districts, and reserved for decision those "special circumstances [that] could satisfactorily demon-

strate that sustained success does not accurately reflect the minority group's ability to elect its preferred representatives." *Id.* at 77, n. 38. Moreover, this Court was careful to state that the framework set out in *Gingles* might not apply to the analysis of challenges to single-member, multi-district plans. *Id.* at 45, n. 12; 48, n. 15; and 49, n. 16. As Justice O'Connor noted in her concurrence, in a single-member district context, "the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice." *Gingles*, 478 U.S. at 87 (O'Connor, J. concurring).

Given the critical differences in the manner in which vote dilution may be accomplished in various redistricting plans, the language of *Gingles* clearly cautions against the mechanical application of a proportional representation analysis to this case. The lower court failed to heed this warning, thereby summarily disposing of a well-documented claim of vote dilution under §2 and refusing to conduct the totality of the circumstances analysis demanded by §2.

B. In *Voinovich*, this Court suggests an approach for analyzing challenges to single-member district plans that conflicts with the lower courts' opinion.

The lower court's assumption that the *Gingles* analysis of the importance of proportional representation applies with equal force in the single-member district context is wrong. In the at-large or multi-member district context, proportional representation is generally both the most useful proxy for a minority group's undiluted voting strength and the best indicator that the minority group has an equal opportunity to elect its preferred representatives. Under multi-member district or at-large plans, all voters are thrown into a single electoral stew; racial gerrymandering is not at issue. Instead, the danger posed by such plans is that "[i]f voting is racially polarized, a white majority is

able to consistently elect its candidates of choice, submerging the preferences of minority voters." *McNeil v. Springfield Park*, 851 F.2d 937, 938 n. 1 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). If, in this situation, minorities are consistently able to elect representatives in proportion to their numbers, it is difficult, if not impossible, to identify any sense in which the multi-member district plan causes dilution of their voting strength.[8]

Things are very different in the single-member, multi-district context. Only last term, in *Voinovich*, this Court recognized that in the single-member district context, "the usual device for diluting minority voting power is the manipulation of district lines," and that in single-member districts (113 S.Ct. at 1155):

> dilution of racial minority group voting strength may be caused either by dispersal of blacks into districts in which they constitute an ineffective minority of voters [fracturing] or from the concentration of blacks into districts where they constitute an excessive majority [packing].

In other words, "boundary manipulation" is the most relevant factor in evaluating whether a single-member, multi-district plan dilutes minority voting strength or causes an inequality in the opportunities enjoyed by African American

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[8] A minority group's sustained proportional representation within the multi-member or at-large context will generally indicate that a substantial portion of the majority group "crosses over" to support minority candidates, a phenomenon that is "inconsistent" with a finding that racial bloc voting submerges minority voting strength to deprive them of equal opportunity to elect candidates of their choice. Proportional representation will be an even more accurate indicator of equal opportunity in multi-member jurisdictions that contain only two racial groups (as was the case in the North Carolina districts analyzed in *Gingles*), since proportional representation for one group necessarily indicates proportional representation for the other group as well.

and white voters to elect their preferred representative. *Id.* at 1155.[9]

Voinovich's emphasis on "fracturing" and "packing" in a single-member district case is not new. Lower courts have long recognized that the fracturing of a minority community coupled with racial bloc voting tends to dilute minority voting strength in violation of §2. *Jeffers v. Clinton*, 730 F.Supp. at 205; *see also Ketchum v. Byrne*, 740 F.2d 1398, 1405 (7th Cir. 1984), *cert. denied* 471 U.S. 1135 (1985); *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 681 (1991); *Kirksey v. Bd. of*

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[9] More recently, in *Campbell v. Theodore*, 113 S.Ct. 2954 (1993) this Court suggests the need for a detailed, fact intensive analysis to determine whether a specific, single-member, multi-district scheme provides a minority group with unequal access to the political process. In *Campbell*, this Court vacated and remanded "for further consideration in light of the position presented by the Acting Solicitor General in his brief of May 7, 1993." In his brief, the Acting Solicitor General presented two positions. First, in the single-member context, the lower court must address "the question whether additional compact and contiguous districts with black majorities could and should have been created in disputed areas to avoid dilution of black voting strength in violation of §2." The brief made no mention of "proportional representation" as a cap on the inquiry (Brief at 7). Second, the district court's identification of African American or white districts requires an in-depth analysis of each district that begins with voting-age population and includes a district-specific analysis of the "extent to which voting is polarized" and "particularized consideration of historical voting patterns, election results, or other data to support treating identified districts as black 'opportunity districts' in the face of plaintiffs' challenges [that less than 57% African-American voting-age population did not provide African-American-opportunity wards]" (Brief at 14 and 15, n. 11). *Accord Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993).

In this case, the lower court made no effort to determine whether the St. Louis ward boundaries diluted African American voting strength nor did it address the question of whether additional compact or contiguous districts with African American majorities could or should be drawn. The undisputed record below resolves both inquiries in the affirmative.

Supervision, 554 F.2d 139, 149 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Robinson v. Commissioners Court*, 505 F.2d 674, 679 (5th Cir. 1974).

For purposes of this case, the importance of the *Voinovich* approach lies in the fact that such manipulation of ward boundaries to "fracture" and "pack" minority populations can be used to dilute minority voting strength throughout a jurisdiction, while at the same time providing for minority electoral success in a "proportional" number of districts. This can occur in three ways. First, the co-existence of proportional representation and minority vote dilution is almost assured when the African American and white population are segregated and *voting-age* population is used to measure proportionality. Assume the following:

(a) a city of 1,200,000 in which African Americans comprise 20% of the total population and 12% of the voting-age population and whites comprise 80% of the total population and 88% of the voting age population;

(b) one-half of the African Americans live in a geographically compact but segregated community at the northern end of the city and the other half live in a geographically compact but segregated community at the southern end; both communities are politically cohesive and there is a history of racial bloc voting; and

(c) the city has 8 single member districts. The 120,000 African Americans who live on the north side reside in one district while the 120,000 African Americans who live on the south side are fractured evenly among four districts so that each district is 75% white and 25% African American.

This hypothetical map has provided "proportional representation" for African Americans based on their percentage of the voting-age population (12% of the voting-age population and 12% of the districts) within the city as a whole,

while denying equal opportunity to African Americans by flagrantly diluting the voting strength of the south side African American population.

Second, proportional representation and significant vote dilution can occur under a single-member district plan whenever more than two racial groups reside within the jurisdiction. In such circumstances, district boundaries can be gerrymandered in order to insure that whites benefit from "surplus" minority populations that are insufficient to form their own districts.[10]

Third, any single-member district map can selectively "fracture" and "pack" minority voters in particular districts in which racial bloc voting occurs, even as minority candidates in other districts within the jurisdiction succeed due to the absence of racial bloc voting.[11]

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[10] Assume, for example, a city of 2,000,000 that is 40% white, 40% African American, 10% Hispanic and 10% Asian and that is divided into 20 single member districts; all four groups are politically cohesive and there is a history of racial bloc voting; the housing patterns are such that both the whites and the African Americans live in a single, segregated community while the Hispanics and Asians live in a number of small, dispersed communities; and finally, none of the Hispanic or Asian communities are large enough to create a district of their own, but can be included in either white or African American majority districts. In this hypothetical, ward boundaries can be manipulated to fracture or pack African Americans and to use other minority populations to help create additional white wards rather than additional African American wards. In our hypothetical, a map could be drawn that packs African Americans into 8 wards (40%), their "proportional" number of wards, while whites can be given 12 wards, a number far in excess of their "proportional" number.

[11] For example, assume a jurisdiction with 8 single-member districts in which the African American population totals 20% of a jurisdiction's total population, that half of this African American population lives in an integrated north side where racial bloc voting is not present, and half live in a geographically concentrated area on the south side with virulent racial bloc voting. For

(continued...)

What all these examples show is that, in the single-member, multi-district context, there is no necessary connection between a particular group's percentage in the city's population and the number of wards where they would be "expected" to have voting control in the absence of manipulative designing of boundaries. Conversely, if a particular group ends up with a "proportional" number of wards, that fact sheds little or no light on whether there has or has not been manipulation of ward boundaries to enhance or to dilute that group's strength. That conclusion can only be drawn from a searching examination of "the totality of the circumstances," including the geographic distributions and density of white, African American and other groups; the impact of the particular boundaries on white, African American and other groups; the process by which they were drawn; the constraints on possible alternative boundaries (for example, geographic features like rivers, railroad tracks, vacant industrial land, etc.); and all the other factors set forth in the Senate subcommittee report to the Voting Rights Act.

In this case, petitioner presented evidence of those facts that, according to *Voinovich*, should be of singular concern in a §2 challenge to a single-member, multi-district plan—namely that in drawing the boundaries of the 1991 map, defendants reduced African American population in specific wards to enhance white voting strength, and systematically "fractured" African American voters to cancel out their voting strength while maximizing the voting strength of the

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[11] (...continued)
such a scenario, African Americans might be elected in two north side districts, thereby providing African Americans with proportional representation as a whole, even while south side African Americans are flagrantly fractured and packed to prevent them from exercising an equal opportunity to elect representatives of their choice.

white population. In support of their allegations, plaintiffs' expert focused on five of St. Louis' 28 wards which comprise the central corridor and on the one ward that runs along the North Riverfront portion of St. Louis—the only geographical areas in St. Louis in which concentrations of African American and white population live in close enough proximity to each other to permit the drawing of wards that could be either white or African American (88-9).[12] At the time of redistricting, the incumbents in all six of these districts were white.

According to plaintiffs' expert, defendants used three techniques in order to preserve white incumbencies. First, the boundaries of the five central corridor wards were redrawn to reduce African American voting strength and increase white voting strength.[13] Next, ward boundaries were

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[12] In the context of a multiple-district plan, the vote dilution analysis must be district specific. *See Gingles, supra.*

[13] The table below outlines the results of the 1991 Remap:

Ward	1980 Map	% White	% Afr-Am	Afr-Am Moved Out	Whites Moved In	1990 Map	% Afr-Am
6	14,100	37.1	59.6	663	1,357	14,746	52.4
7	13,298	49.9	46.6	500	1,330	14,278	39.9
8	14,661	58.0	37.3	809	(1,336)	14,052	44.6
17	15,680	46.1	48.8	1,980	790	14,279	39.7
28	17,522	64.4	31.9	776	(2,625)	14,071	34.1

To see the significance of these manipulations, consider the 6th ward. Under the 1981 ward map, according to the 1990 census, the 6th ward was 59.6% African American and it was 67 persons short of the ideal ward population of 14,167. The ward did not have to be redrawn at all. Instead, defendants manipulated the ward boundaries to remove 663 African Americans and moved in 1,357 whites. Thus, a 59.6% African American majority became a 52.4% majority (which translates to a 46% voting-age minority). Had defendants reversed the flow, the 59.6% African American majority would have been elevated to over 66% (6, 163, 169, 159-167; 171-74, 121). Thus, African American voting strength was reduced from 13 voting-age majority wards and 1 plurality ward to 12 voting age majority wards.

manipulated to "fracture" politically-cohesive, homogenous, African American populations, but not white populations.[14] Finally, defendants drew the boundaries of the 2nd Ward to maximize white voting strength.[15]

Such systematic manipulation of ward boundaries to advantage one racial group over another is precisely what the Voting Rights Act is designed to prevent. Under the analytical framework suggested in *Voinovich*, a court would have necessarily considered these facts in making its "totality of the circumstances" analysis. Under the lower court's approach, on the other hand, such blatant manipulation of ward boundaries can be safely ignored. Neither the Act, nor *Gingles*, nor *Voinovich*, countenance such an approach. Because there is no necessary correlation between proportional representation and the existence, or lack thereof, of vote dilution in the single-member district context, this Court must clarify the applicability of the *Gingles*

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[14] Within the five central corridor wards reside 71,426 persons, of whom 30,476 (42.2%) are African American. This area could have been redistricted to include two effective African American wards, and three effective white wards. Instead, the 1991 Map distributed the 30,476 African Americans in ineffective groupings among five white wards in percentages of 52.6 (but 45.9% of voting-age population), 40.2, 45.0, 40.1, and 34.3 of the total population of each ward respectively (5, 163, 164-7).

[15] At the time of redistricting, the old 2nd Ward was 64.3% African American (58.4% voting-age population) and was bordered on the east and north by the river and on its west by five wards that were 93.0%, 95.8%, 98%, 98.8% and 98.9% African American. Defendants could easily have drawn a compact ward with an effective African American voting-age majority. Instead, the 2nd ward was drawn in 1991 to run from the central corridor to the far northern boundary of the city in order to pick up as much white population as possible (39.5% of the voting age population) to preserve the reelection prospects of the white incumbent (163-4; 169-70; 171-74; 120-1).

framework to §2 challenges to single-member district plans.[16]

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[16] If the analytic framework set forth in *Gingles* is to apply to single-member district claims, then the lower courts need guidance as to the factors that constitute "special circumstances" that override the sustained proportional representation defense. Writing for the majority in *Gingles*, Justice Brennan and Justice White concluded that a minority group's proportional electoral success will usually be dispositive if it is sustained over a number of elections, *and* if plaintiffs fail to demonstrate "*special circumstances that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives.*" 478 U.S. at 77, n.38. This Court in *Gingles* specifically reserves the question of what such a category of "special circumstances" might include. *Ibid.*

The lower courts that have attempted to analyze single-member plans within the *Gingles* framework are at odds over the application of the "special circumstances" language. For example, in the instant case, the lower court seems to have accepted defendants' argument that "special circumstances" are limited to factors such as "bullet voting" because they were the only factors suggested by this Court in *Gingles*, 478 U.S. at 57, n.25. However, the "special circumstances" identified in *Gingles* while illustrative in the multi-member district context, have no relevance in the single-member district context. In *Barnett*, the court held that the "special circumstances" can only be those circumstances which indicate that proportional representation is "attributable to transient factors" . . . 835 F.Supp. at 1069, n.8. *See also Nash*, 797 F.Supp. at 1499-1505. This analysis overlooks the fact the "special circumstances" discussed in *Gingles* come into play only after it has been found that *sustained* proportional representation exists.

Given this court's emphasis in *Voinovich* on the importance of manipulation of ward boundaries in the single-member district plan, a showing that district boundaries have been manipulated to dilute a minority group's voting strength and to advantage another racial group must, *at the very least*, constitute a "special circumstance" that overrides a showing of proportional electoral success. Only through such an approach can this Court's holding in *Gingles* be reconciled with the language in *Voinovich* and the mandate set forth by Congress in its amendments to the Voting Rights Act. Guidance by this Court is needed.

C. The lower courts' approach conflicts with the language and purpose of the Voting Rights Act itself.

Section 2 of the Voting Rights Act states that "[t]he extent to which members of a protected class have been elected to office in the . . . political subdivision is *one factor which may be considered*" in the evaluation of vote dilution claims (emphasis added). This directive appears as part of the proviso which establishes that the members of the protected class have no *per se* right to proportional representation under §2.

By treating minority electoral success as the *only* factor to consider, the lower courts' opinion effectively turns the language of section 2 on its head. Under the lower courts' approach, proportional representation effectively becomes a *per se* cap on a minority group's electoral rights, leaving officials free to gerrymander district boundaries to maximize the voting strength of the jurisdiction's majority voters.

Ironically, such an approach encourages precisely the kind of focus on proportional representation that the Voting Rights Act itself disavows. The Act makes clear that nothing in it is intended to guarantee proportional representation to any group. Nor is the Act intended to guarantee maximizing any particular group's voting strength. What the Act is intended to guarantee—in each and every area of the city—is protection against unequal treatment in the political process on the basis of race.

The absolute defense of proportional representation recognized by the lower court moves the law away from this fundamental protection of the Act and the searching "totality of the circumstances" analysis this Court demands, and into the kind of overall numbers game that the Act itself and its critics condemn, whereby justice turns a blind eye to practices that systematically discriminate against minority voters, so long as white officials "give" them

roughly proportional representation. Such a balanced-bottom-line approach to analyzing voting rights claims has been soundly rejected by this Court in other contexts, *Connecticut v. Teal*, 457 U.S. 440, 448-54 (1982); *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 579-80 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543-44 (1971); and has been rejected by the Seventh Circuit in the voting rights context. *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992).

In this case, the demographics of St. Louis permits the drawing of ward maps that could produce from 17 white and 11 African American aldermen to 11 white and 17 African American aldermen. The St. Louis map caps African American representation at 11 aldermen while preserving the ability of the similarly geographically compact white community to elect 17 aldermen. No one has disputed, at any point in this litigation, that if the map had been drawn without any consideration of racial demographics or if African Americans and whites were fractured and otherwise treated evenhandedly, there would be more wards in which African Americans would have the opportunity to elect their candidate of choice.

Such systematic and unequal treatment must not go unremedied. Without clear direction from this Court, the "proportional representation defense" recognized by the lower court will mean exactly that. A writ of certiorari should be issued so that this Court can guide the lower courts in the proper analytical framework for the growing number of §2 challenges to single-member, multi-district plans.

II.

THE LOWER COURTS' HOLDING THAT PROPORTIONAL REPRESENTATION BARS A §2 INTENT CLAIM CONFLICTS WITH THE RULINGS OF THIS COURT AND WITH OTHER CIRCUITS.

To the extent that a redistricting plan is "conceived or operated as [a] purposeful device to further racial discrimination" it is actionable under §2 as well as the Fourteenth Amendment. *City of Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980); *see, e.g., Ketchum v. Byrne*, 740 F.2d at 1406; *Major v. Treen*, 574 F.Supp. 325, 350 (E.D. La. 1983) (three-judge court) (Intentional discrimination in the redistricting process that violates the 14th Amendment is also actionable under §2). This Court has long recognized that a law that intentionally disadvantages a minority group to secure advantage for whites is presumptively unlawful:

> An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our constitution or under [the Voting Rights Act].

City of Richmond v. United States, 422 U.S. 358, 378 (1975). Because discrimination has no legitimacy under law, this Court has held that the defense of proportional representation cannot foreclose a claim of intentional discrimination. *See City of Richmond*, 422 U.S. at 372-79 (holding, in a case under Section 5 of the Voting Rights Act, that the intent to discriminate through a municipal annexation is actionable even though the post-annexation districting plan provided African Americans with proportional representation); *see also Baird*, 976 F.2d at 360 (Proof of intentional discrimination overcomes the defense of proportional representation in §2 claim).

Indeed, this Court recently held in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), that white plaintiffs could pursue a cause of action under the Fourteenth Amendment by alleging that

intentional discrimination existed where a majority African American district was so irregular in shape that it could only be explained as an attempt at pure racial gerrymandering. The significance of *Shaw* to this petition is that the white plaintiffs were permitted to press their intentional racial gerrymandering claim even though they enjoyed substantially more than proportional representation.[17]

In this case, the lines of the 1991 map may not be so bizarre as to qualify under the standard set forth in *Shaw*. However, plaintiffs in this case are not relying solely on the facial irregularity of the map. Plaintiffs go well beyond the allegations offered by the *Shaw* plaintiffs, and point to an array of facts that demonstrate that the boundaries were systematically manipulated to maximize white voting strength, preserve white incumbencies, and reduce African American voting strength. These facts are the classic indicia of an intentional racial gerrymander. *See Gomillion v. Lightfoot*, 346 U.S. 339 (1960).[18] In addition, plaintiffs

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[17] The dissenters in *Shaw* objected in part on the ground that white North Carolinians enjoyed representation in excess of their numbers in the population, and that the white plaintiffs in that case had alleged no discriminatory effect.

Nevertheless, Justice White, who had previously joined Justice Brennan in *Gingles* with respect to the importance of proportional representation in the multi-member district context, acknowledged the possibility that the mere fact that a racial group enjoys proportional representation does not foreclose the possibility of discriminatory effect, since in the single-member district context, "such districting might have both the intent and effect of 'packing' members of that group so as to deprive them of any influence in other districts." 113 S.Ct. at 2835, n. 6 (White, J. dissenting).

[18] *See also City of Port Arthur, Texas v. United States*, 517 F.Supp. 987 1022 (D.D.C. 1981) (three-judge court), *aff'd*, 459 U.S. 159 (1982) (reduction of African American voting strength indicates "invidious motive" in §5 Action under Voting Rights Act); *Ketchum*, 740 F.2d at 1408 (discrimination based on an ulti-

(continued...)

offered evidence of racial bloc voting; depressed socioeconomic status attributable to a history of discrimination in education, housing and employment; and a history of discrimination in electoral matters. These factors also support a finding of intentional discrimination. *Rodgers v. Lodge*, 458 U.S. 613, 622-27 (1982).

It would be a perversion of justice to rule that white plaintiffs in North Carolina may challenge a map under the 14th Amendment that was drawn by the State in order to remedy perceived inequities between African American and white voters, solely because the map is inartfully drawn, while at the same time barring a §2 intent claim that provides detailed evidence of systematic boundary manipulation and "fracturing" to purposely diminish African American voting strength. Yet this is precisely the interpretation *Shaw* and *Gingles* have received in the lower courts. In this case, the lower courts refused to even consider plaintiffs' allegations because of a finding of proportional representation. Likewise, in *Barnett*, the court held that once proportional representation is established, plaintiffs can no longer assert an intent to dilute claim. According to the *Barnett* court, the only intent claims available to plaintiffs are challenges (a) to practices that "actually bar minorities from voting . . . or interfere with their right to register," or (b) to a reapportionment scheme "so extremely irregular on its face that it can be viewed as an effort to segregate the races." 835 F.Supp. at 1068-70.

The lower court's summary disposition of plaintiffs' intentional discrimination claim by finding that African

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[18] (...continued)
mate objective of keeping certain incumbent whites in office is indistinguishable from discrimination borne of pure racial animus); *Rybicki v. State Board of Elections*, 574 F.Supp. 1082, 1108-09, (N.D. Ill. 1982) (three-judge court); *Garza v. City of Los Angeles*, 918 F.2d at 771.

Americans were provided with the opportunity to achieve proportional representation under the challenged plan squarely conflicts with this Court's pronouncements in *Richmond* and *Shaw*. A writ of certiorari should issue to clarify the relationship between proportional representation and claims of intentional vote dilution.

III.

IF PROPORTIONAL REPRESENTATION IS TO SERVE AS A DEFENSE TO VOTING RIGHTS CLAIMS, THE LOWER COURTS' USE OF VOTING-AGE POPULATION RATHER THAN TOTAL POPULATION AS THE MEASURE OF PROPORTIONAL REPRESENTATION RAISES AN IMPORTANT ISSUE ON WHICH LOWER COURTS HAVE TAKEN DIVERGENT POSITIONS.

A. This Court should provide direction to lower courts who are in conflict regarding the proper measure of proportional representation.

Lower courts that have attempted to apply the *Gingles*' proportional representation analysis to single-member district plans cannot agree on how it is to be measured. In the instant case as well as in *Rural West Tennessee*, *supra*, the courts used voting-age population as the appropriate measure. In *Nash*, 797 F.Supp. at 1498-1502; *Jeffers*, 730 F.Supp. at 198; and *Barnett v. Daley*, 809 F.Supp. 1323, 1329 (N.D. Ill. 1992), the courts relied upon *Gingles* and used total population as the proper measure of proportional representation. In the *DeGrandy* case currently pending before this court, appellants argue that this court should use citizenship population as the proper measure. If lower courts are to use proportional representation as an important factor in analyzing vote dilution claims in the single-member, multi-district context, a writ of certiorari should be issued to resolve this conflict.

B. The language of the Act and this Court's precedents indicate that total population is the proper measure of proportionality.

The lower courts' use of voting-age population to measure proportional representation directly conflicts with the language of §2 and decisions of this Court which hold that where proportional representation is relevant, total population is the proper measure.[19]

The starting point is the Act itself. Section 2 defines a violation in terms of a showing that the electoral scheme provides minority citizens with less opportunity "than other members of the electorate" to participate in the political process and to elect candidates of their choice. It then disavows a minority's right to proportional representation in the following language: "Nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population*" (Emphasis added). Clearly, §2 defines proportional representation by "population", not "voting-age population" or "the electorate."

Additionally, when Congress amended §2 in 1982, it expressly noted that: "The principle that the right to vote is

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[19] The lower court's use of voting-age stems simply from its observation that "voting age is an appropriate measure for voting rights cases." (App. B-9) Voting-age population is in fact one of the important factors in determining whether a minority's total population within a specific district is sufficient to provide it with a reasonable opportunity to elect its preferred candidates. *See, e.g., McNeil, supra*; *Jeffers v. Clinton*, 730 F.Supp. at 199. But it has no relevance to a proportional representation analysis. Proportional representation is relevant only to the extent that it is a surrogate for a group's undiluted voting strength. Since total population is used to reapportion single-member districts, however, a minority's total population figures are the only population figures that determine the number of effective minority wards that can be drawn and thereby measure the group's undiluted voting strength.

denied or abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims*." S. Rep. No. 417, 97th Cong., 2d Sess. 19 *reported in* 1982 U.S. Code Cong. and Admin. News 177, 196. In *Reynolds v. Sims*, 377 U.S. 535, 560-61 (1964), this Court stated "[t]he fundamental principal of representative government is one of equal representation for equal numbers of people . . . ." This "one-person, one-vote" principle is based on total population. In *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969), the Court recognized that "equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected officials." Reapportionment on the basis of total population guarantees equal representation and equal access to our elected officials.

In *Gingles*, this Court applied this principle of "proportional representation" to the Voting Rights Act and used *total* population, not voting-age population, as its measure. According to the Court in *Gingles*, the test for establishing sustained electoral success of the minority community in a multi-member district was whether "black *residents*" had proportional representation. 478 U.S. at 74-77 (emphasis added); 478 U.S. at 74, n. 35; *see also United Jewish Organizations v. Carey*, 430 U.S. 144, 166 (1977) (a claim under §5 of the Act). The Court then observed that in North Carolina's 23rd district, "the last six elections have resulted in proportional representation for *black residents*." *Gingles*, 478 U.S. at 77 (emphasis added). It determined proportional representation by measuring the minority group's percentage of *the total population* (36.3%) with its electoral success rate (one of three electoral representatives). *Gingles*, 478 U.S. at 74, n. 35, and 478 U.S. at 104 (O'Connor, J., concurring); *see Garza v. County of Los Angeles*, 918 F.2d at 776 (the use of voting-age population rather than total population discriminates against minorities by diluting "the access of voting-age [minorities] . . . to their representatives, and

would similarly abridge the right of . . . minors to petition their representatives"). As long as the wards are apportioned on the basis of total population, proportional representation must be measured by the same population base.

In the end, there is only one reason for using voting-age population as the measure of proportional representation: it permits the white majority to provide the minority community with the fewest number of districts while still immunizing their handiwork from a §2 challenge.[20] This result conflicts with the repeated admonition of this Court that §2 of the Act "should be interpreted in a manner that provides 'the broadest possible scope in combatting racial discrimination." *Chisom v. Roemer*, 111 S.Ct. 2354, 2368 (1991), *quoting Allen v. State Board of Education*, 393 U.S. 544, 567 (1969).

IV.

THIS CASE RAISES ISSUES SIMILAR TO THOSE RAISED IN *DEGRANDY v. JOHNSON* MAKING DEFERRAL APPROPRIATE.

On February 22, 1993, this Court noted probable jurisdiction in the Florida state legislative redistricting case. *DeGrandy v. Johnson*, No. 92-519, 113 S.Ct. 1249 (1993). The issues in *DeGrandy*, as here, are whether (a) proportional representation is a defense to a §2 challenge to a single-member, multi-district plan; and if so, (b) what weight is it to be given within a "totality of the circumstances" analysis; (c) is proportional representation to be determined on a jurisdiction-wide basis or on a more localized basis, (i.e.,

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[20] The fundamental unfairness in using voting-age population to further reduce minority representation is compounded by the fact that there is clear and convincing evidence that African American population was seriously under-counted in the last census. *See City of New York v. U.S. Dept. of Commerce*, 822 F.Supp. 906, 913 (E.D.N.Y. 1993); *Assembly of State of California v. U.S. Dept. of Commerce*, 968 F.2d 916, 917 (9th Cir. 1992).

should the court look at the City of St. Louis as a whole or focus on the central corridor area where the boundaries were manipulated to dilute minority voting strengths); and (d) is it to be measured by total population or some other population figure. These issues will have a significant bearing on the proper resolution of all single-member district claims including the St. Louis reapportionment. For these reasons, deferral is appropriate.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

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APPENDICES

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APPENDIX A

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC.; Charles Q. Troupe; Angela D. Walton, Plaintiffs,

Freeman Bosley, Jr.; Bertha Mitchell, Appellants,

Ida Ford; Charles Parker; Albert Banks; Carol Page; Luretta Hawkins; Elmer Otey; Jacqueline McGill, Plaintiffs,

Sharon Tyus, Appellant,

Laura Gordon; Alexis Johnson, Plaintiffs,

Irving Clay; Claude Taylor, Appellants,

v.

Thomas A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; Vincent C. Schoemehl, in his capacity as Mayor, City of St. Louis, Missouri; Board of Aldermen, City of St. Louis, Missouri; City of St. Louis, Appellees.

American Civil Liberties Union, Amicus Curiae.

No. 92-3826.

United States Court of Appeals, Eighth Circuit.

Submitted May 12, 1993.

Decided Aug. 4, 1993.

Order Denying Rehearing and Rehearing En Banc Nov. 1, 1993.

Appeal from the United States District Court for the Eastern District of Missouri; Hon. Jean C. Hamilton, District Judge.

Judson Miner, Chicago, IL, argued for appellants.

Donna A. Smith, St. Louis, MO, on brief for amicus curiae American Civ. Liberties Union.

Julian Bush, St. Louis, MO, argued (James J. Wilson, Edward J. Hanlon and Michael Garvin, on brief), for appellees.

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

Plaintiffs-appellants appeal from the district court's[1] order granting summary judgment to defendants-appellees, the Mayor of the City of St. Louis (the City), the President of the Board of Aldermen, and the Board of Aldermen. Appellants brought this action claiming the City's redistricting ordinance which established ward boundary lines for selecting aldermen and for selecting political party committees violated § 2 of the Voting Rights Act and the First, Thirteenth, Fourteenth, and Fifteenth Amendments. We affirm.[2]

Appellants claim the district court erred by: (1) applying the affirmative defense of sustained proportional representation to the § 2 claim; (2) measuring proportional representation by comparing the minority group's percentage of the voting age population to the minority group's percentage of elected representatives; (3) finding the City's African-American community controls twelve wards and is thus proportionally represented; (4) finding the City's African-American community has had a sustained history of electoral success evidenced by proportional representation throughout the 1970s and 1980s; and (5) holding there are no special circumstances showing the African-American

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[1] The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri.

[2] The motion of appellants for supplemental briefing is denied as moot.

community's sustained electoral success does not accurately reflect the community's ability to elect its preferred representatives.

We find no error of law or clearly erroneous findings of fact in the district court's well-reasoned memorandum, and an opinion would have no precedential value. We affirm the judgment of the district court. *See* 8th Cir.R. 47B.

Before: RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

ORDER

Nov. 1, 1983.

The suggestion for rehearing en banc is denied. Judge McMillian would grant the suggestion.

The petition for rehearing by the panel is also denied.

McMILLIAN, Circuit Judge, dissenting.

I respectfully dissent from this court's denial of the suggestion for rehearing en banc.

Plaintiffs challenge the City of St. Louis' 1990 redistricting map for aldermanic wards as violative of § 2 of the Voting Rights Act and the Constitution. The district court granted defendants' motion for summary judgment and this court summarily affirmed. This case raises important legal and factual issues under the Voting Rights Act. In my view, genuine issues of material fact exist making this case wholly unsuited for summary judgment. The district

court gave no consideration to, and made no findings concerning, serious allegations and evidence of a violation of § 2 of the Voting Rights Act. In particular, I believe the district court should have made detailed findings regarding whether the City of St. Louis intentionally created its aldermanic districts to dilute black voting strength in violation of Section 2. "Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process." *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986). The district court and the panel deprived plaintiffs of such an opportunity.

APPENDIX B

[Filed June 17, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC., et al.,	)	
Plaintiffs,	)	Cause No.
vs.	)	4:92CV00044 JCH
THOMAS A. VILLA, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion for summary judgment.

Plaintiffs filed this action seeking a declaratory judgment and injunctive relief. Plaintiffs allege the City's ward boundary lines for selecting aldermen and for selecting political party committees violate the First Amendment, the Thirteenth Amendment, the Fourteenth Amendment, the Fifteenth Amendment and the Voting Rights Act.

Defendants contend that the populations of the city wards are sufficiently equal to meet requirements of the

Fourteenth Amendment and that the boundary lines under the redistricting plan do not violate the Voting Rights Act because the current plan and all plans since 1971 have provided proportional representation. Defendants further contend that the Voting Rights Act is unconstitutional and that Plaintiffs' Thirteenth Amendment claim should be dismissed.

This Court may grant a motion for summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law determines which facts are critical and which are irrelevant. Only disputes over facts that might affect the outcome will properly preclude summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not proper if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*

A moving party always bears the burden of informing the Court of the basis of its motion. *Celotex Corp.*, 477 U.S. at 323. Once the moving party discharges this burden, the nonmoving party must set forth specific facts demonstrating that there is a dispute as to a genuine issue of material fact, not the "mere existence of some alleged factual dispute." Fed. R. Civ. P. 56(c); *Anderson*, 477 U.S. at 247. The nonmoving party may not rest upon mere allegations or denials of his pleading. *Id.* at 256.

In passing on a motion for summary judgment, the Court must view the facts in the light most favorable to the nonmoving party, and all justifiable inferences are to

be drawn in his favor. *Id.* at 255. The Court's function is not to weigh the evidence but to determine whether there is a genuine issue for trial. *Id.* at 249.

CONSTITUTIONAL CLAIMS

Reapportionment is a legislative function. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978). The Supreme Court has recognized that the legislature is "best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality." *Connor v. Finch*, 431 U.S. 407, 415-16 (1977).

In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court recognized that every qualified resident has the constitutional right to a vote substantially equal in weight to the vote of every other resident in an election for state legislators. *Reynolds v. Sims*, 377 U.S. at 568. The concept of "one-person-one-vote" also applies to units of local government within a state. *Avery v. Midland County*, 390 U.S. at 474, 484-85 (1968). Particular circumstances and needs of a local community as a whole may at times justify departures from strict equality. *Abate v. Mundt*, 403 U.S. 182, 185 (1971). Less fundamental concerns, however, must be subordinated to the constitutional requirement of "one-person-one-vote." *Kirksey v. Board of Supervisors*, 554 F.2d 139, 151 (5th Cir. 1977), *cert. denied, Board of Supervisors v. Kirksey*, 434 U.S. 968 (1977).

Population is the starting point for consideration and the controlling criterion for judgment in apportionment decisions. *Reynolds v. Sims*, 377 U.S. at 567. Population alone is the sole criterion of constitutionality in congressional reapportionment. *Mahan v. Howell*, 410 U.S. 315, 322 (1973). A legislative body reapportioning state legis-

lative districts, however, has broader latitude. *Id.* A state legislative reapportionment plan having a maximum population deviation ranging up to ten percent falls within the category of minor deviations requiring no legislative justification. *Brown v. Thomson*, 462 U.S. 835, 842 (1983).

Defendants submitted the affidavit of Donald L. Davison (hereinafter Davison) in support of their contention that the populations of the wards are sufficiently equal to meet the requirements of the Fourteenth Amendment. Davison relied on data compiled by the Bureau of Census to conduct his analysis. (Davison Affidavit ¶ 3) Of the twenty-eight wards, the boundaries of twenty-four are coterminous with census blocks. In two cases where a boundary cut across a single census block, Davison relied upon his own personal inspection and upon the affidavit of Stephen Umscheid (hereinafter Umscheid) of the Community Development Agency. (Davison Affidavit ¶3) The total population is 396,685. The ideal ward population is 14,168, the total population divided by the number of wards. Deviation from the ideal is determined by subtracting the ideal from the actual ward population. The percentage deviation for each ward is determined by dividing the deviation by the ideal. The overall range or maximum deviation is the sum of the deviation of two wards which establish the upper and lower deviations for all wards. (Davison Affidavit Ex. B) The average percent deviation for all twenty-eight wards in St. Louis under the 1991 redistricting plan is 2.83% and the overall range or maximum deviation is 8.3%. (Davison Ex. B, Table 2)

Plaintiffs did not file a memorandum in opposition to the summary judgment. They did file the affidavit of their expert Charlene L. Jones (hereinafter Jones). Jones' affidavit does not refute the figures in the Davison affidavit. Jones merely challenges the method used in arriving at

the figures and states that because four wards did not contain whole census blocks that compliance by the plan with the Fourteenth Amendment is "incapable of being ascertained." Jones, who states in her affidavit that she reviewed the affidavit and deposition of Stephen Umscheid, also asserts that Umscheid testified he "adjusted census data" based on aerial photographs. No such statement concerning adjusted data is included in the Umscheid affidavit contained in the record before the Court. That affidavit does explain the method used for apportioning population when a ward line split census blocks. Moreover, no deposition of Stephen Umscheid is contained in the record before this Court.

There is no requirement that the federal decennial census blocks be used in reapportionment. *Burns v. Richardson*, 384 U.S. 73, 91 (1966). Plaintiffs have not contended that the method used to apportion population to wards where census blocks were split is unreasonable or erroneous or that errors would cause the maximum deviation to be greater than 10%. Plaintiffs therefore have not raised an issue for trial. The maximum deviation of 8.3% is well within the 10% allowed under the law. Defendants shall have summary judgment on Plaintiffs' Fourteenth Amendment claim.

Plaintiffs also contend the plan violates the Thirteenth Amendment. Plaintiffs have pleaded no facts to support such a contention and Plaintiffs' opposition affidavit fails to address the issue. Defendants shall have summary judgment on Plaintiffs' Thirteenth Amendment claim. Furthermore, Plaintiffs fail to state a claim for relief under the First Amendment, the Thirteenth Amendment, and the Fourteenth Amendment. They have pleaded no statutory provision allowing a civil action to redress constitutional violations.

VOTING RIGHTS ACT CLAIM

The Voting Rights Act as amended in 1982 provides in pertinent part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C.A. §1973(a) (1991 Supp.). A violation of the Voting Rights Act is established by showing that the "political processes leading to nomination or election . . . are not equally open to participation" by the protected class in that "its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C.A. §1973(b) (1991 Supp.). The Voting Rights Act specifically provides that the act does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C.A. §1973(b) (1991 Supp.). Evidence of discriminatory intent is no longer necessary to prove a violation; discriminatory results are sufficient proof. *Ketchum v. Byrne*, 740 F.2d 1398, 1403 (7th Cir. 1984), *cert. denied, City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985).

A number of courts have concluded that more than a simple majority is required for historically disadvantaged minorities to have a practical opportunity to elect candidates of their choice. *E.g., Ketchum v. Byrne*, 740 F.2d at 1413; *Kirksey v. Board of Supervisors*, 554 F.2d at 149-50; *Smith v. Clinton*, 687 F.Supp. 1361, 1362-63 (E.D. Ark. 1988), *aff'd, Clinton v. Smith*, 488 U.S. 988 (1988); *Dillard v. Crenshaw County*, 649 F.Supp. 289, 298 (M.D. Ala.

1986), *remanded on other grounds*, 831 F.2d 246 (11th Cir. 1987). Courts have frequently used sixty-five percent as a guideline for the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice. The sixty-five percent figure is derived by augmenting parity[1] five percent for the relative youth of the minority population, five percent for its low voter registration, and five percent for its low voter turnout.[2] *Ketchum v. Byrne*, 740 F.2d at 1415. The sixty-five percent population figure is a mere guideline.

Defendants contend that as a matter of law Plaintiffs cannot establish their Voting Rights Act claim because evidence of persistent proportional representation establishes that there is no violation of Section 2. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court noted that "persistent proportional representation is inconsistent with appellees' allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority." *Thornburg v. Gingles*, 478 U.S. 30, 77 (1986) (multimember district case). In *Harvell v. Ladd*, 759 F.Supp. 525 (E.D.Ark. 1991), sustained electoral success by black candidates led the court to conclude that black voters did not have less opportunity to elect representatives of their choice. *Harvell v. Ladd*, 759 F.Supp. 525, 529 (E.D. Ark.

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[1] The court in *Ketchum v. Byrne* said that the 65% guideline was derived by augmenting a simple majority.

[2] The 65% figure is used by the Justice Department as a threshold population figure for finding impermissible retrogression of minority voting strength in redistricting matters reviewed under Section 5 of the Voting Rights Act. *James v. City of Sarasota*, 611 F.Supp. 25, 32 (M.D. Fla. 1985).

1991) The decision referred to sustained electoral success as the overriding factor. *Id.* In *Collins v. City of Norfolk*, 679 F.Supp. 557 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 1232 (4th Cir. 1989), the court concluded that the plurality in *Gingles* established that proportional representation bars a Section 2 claim. *Collins v. City of Norfolk*, 679 F.Supp. 557, 563 (E.D. Va. 1988), *rev'd on other grounds*, 883 F.2d 1232 (4th Cir. 1989).

Based upon the 1990 census data there are twelve wards in which black voters should be able to elect representatives of their choice. (Davison affidavit ¶ 4) The twelve "safe" wards represent 42.86% of the twenty-eight wards in the city. The size of the black voting age population in the city is 42.67%. (Davison affidavit ¶4; Davison Affidavit Ex. C) Under the 1981 plan the black voting age population was 40.2% and the black representation was 39.29%. (Davison affidavit ¶5; Davison affidavit Ex. D) Under the 1971 plan the black voting age population was 34.95% and the black representation was 35.71%. (Davison affidavit ¶6 [p.6]; Davison affidavit Ex. E)

Plaintiffs do not refute that the black aldermen serving from the 1970s to present were and are representatives of the minority community's choice. They do not suggest special circumstances that would demonstrate that the apparent sustained success does not accurately reflect the minority's ability to elect its preferred representatives. Instead, Plaintiffs submit a largely conclusory affidavit containing one legal argument that the use of voting population instead of total population in determining proportionate representation is constitutionally defective based on the holding in *Preisler v. Mayor of City of St. Louis*, 303 F.Supp. 1071 (E.D. Mo. 1969). However, *Preisler* involved an analysis under the Fourteenth Amendment and

addressed what measure of population is appropriate for determining population under the requirements of the Fourteenth Amendment. Voting age is an appropriate measure for Voting Rights Act cases. *See, e.g., McNeil v. Springfield Park Dist.*, 851 F.2d 937, 945 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

Defendants have demonstrated and Plaintiffs have failed to refute that sustained electoral success by black candidates defeats Plaintiffs' claim that black voters have less opportunity to elect representatives of their choice. Defendants shall have summary judgment on Plaintiffs' claim pursuant to the Voting Rights Act. The constitutional issues raised in Defendants' memorandum need not be addressed.

ACCORDINGLY,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is GRANTED.

Dated this 17th day of June, 1992.

/s/ JEAN C. HAMILTON
United States District Judge

APPENDIX C

[Filed November 2, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

AFRICAN AMERICAN VOTING RIGHTS LEGAL DEFENSE FUND, INC., et al.,	)	
Plaintiffs,	)	Cause No.
vs.	)	4:92CV00044 JCH
THOMAS A. VILLA, et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment pursuant to Federal Rule of Civil Procedure 59(e).

Plaintiffs filed this action seeking declaratory and injunctive relief on January 13, 1992. Plaintiffs alleged that the ward boundary lines of the City of St. Louis which are used for the selection of alderman and political party committees violate the First Amendment, the Thirteenth Amendment, the Fifteenth Amendment, and the Voting Rights Act. This Court granted summary judgment for

Defendants on June 17, 1992. The Court reasoned *inter alia*, that Defendants demonstrated and Plaintiffs failed to refute that the "sustained electoral success by black candidates defeats Plaintiffs' claim that black voters have less opportunity to elect representatives of their choice."

Plaintiffs move the Court to reconsider its judgment granting summary judgment to Defendants, asserting that the Court "was misled by Defendants' inaccurate and incomplete presentation." Defendants oppose the motion, contending that "[a]ll of what is argued in the motion is or could have been argued before judgment was entered." Plaintiff's Rule 59(e) motion was filed within the ten day time limit.

Under Federal Rule of Civil Procedure 59(e), a district court has broad discretion in determining whether to reconsider a decision. *Roudybush v. Zabel*, 813 F.2d 173, 178 (8th Cir. 1987); *Harris v. Arkansas Dep't of Human Services*, 771 F.2d 414, 416-17 (8th Cir. 1985); *Pitts v. Electro-Static Finishing, Inc.*, 607 F.2d 799, 803 (8th Cir. 1979). Rule 59(e) was adopted to make clear that a district court possessed the power to rectify its own mistakes in the period immediately following the entry of judgment. *White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 450 (1982). A Court may use Rule 59(e) to set aside a judgment in its entirety. *Sanders v. Clemco Indus.*, 862 F.2d 161, 168, n.13 (8th Cir. 1988).

Under Rule 59(e), the court may reconsider matters properly encompassed in a decision on the merits. *White*, 455 U.S. at 451. A Rule 59(e) motion may not encompass new issues. *Ray E. Friedman & Co. v. Jenkins*, 824 F.2d 657, 660 (8th Cir. 1987) (Rule 59(e) could not be used to assert a counterclaim).

A motion to alter or amend under Rule 59(e) must rely on one of three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence not available previously; or (3) the need to correct a clear error of law or prevent manifest injustice. *Bannister v. Armontrout*, No. 87-0637-CV-W-9, 1992 U.S. Dist. LEXIS 7335, at *2 (W.D. Mo. Apr. 30, 1992) (citations omitted).

Here, Plaintiffs appear to rely on the third ground to support their motion to alter or amend. Plaintiffs assert that the Court's judgment was based on the Defendants' incorrect argument that "there can be no voting rights violation if a ward map provides a minority community with the possibility of achieving proportional representation based on the minority's percentage of the voting-age population." The issue before the Court is whether Plaintiffs have shown a clear error of law in the order granting summary judgment for Defendants.

Plaintiffs challenge to the Court's findings concerning the electoral success of the African-American community. The challenge, however, is dependent on additional facts which Plaintiffs failed to produce in response to Defendants' summary judgment motion. Plaintiffs have shown no clear error of law on the record before the Court when the Court entered its order of June 17, 1992. By their own admission, Plaintiffs failed to fully respond to Defendants' summary judgment motion, they filed only an affidavit by their expert. Plaintiffs now attempt to amend the record. Because Plaintiffs have shown no reason why the facts and issues now presented could not have been produced at an earlier time, it is inappropriate to reconsider the judgment based on an amended factual record.

Plaintiffs also contend that the Court was in error in using voting-age population, rather than total population,

to measure proportional representation. Voting-age population is the pertinent population for Voting Rights Act purposes. *Harvell v. Ladd*, 958 F.2d 226, 227-28 (8th Cir. 1992).

After carefully reviewing the briefs filed by the parties, the Court concludes that Plaintiffs are not entitled to relief from summary judgment under Rule 59(e). Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment pursuant to Federal Rule of Civil Procedure 59(e) will be denied because none of the three grounds for the motion have been established. First, there has been no intervening change in controlling law. Second, Plaintiffs have not established the availability of any new evidence which was not available previously. Third, there was no clear error of law or manifest injustice in granting Defendants motion for summary judgment.

ACCORDINGLY,

IT IS HEREBY ORDERED that Plaintiffs' Motion to Alter or Amend this Court's June 17, 1992 Judgment is DENIED.

Dated this 2nd day of November, 1992

/s/ JEAN C. HAMILTON
United States District Judge

APPENDIX D

SUBCHAPTER I-A—ENFORCEMENT OF VOTING RIGHTS

§ 1973. Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites: establishment of violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(As amended Pub. L. 97-205, § 3, June 29, 1982, 96 Stat. 134.)

Supreme Court, U.S.
FILED
MAR 31 1994
OFFICE OF THE CLERK

No. 93-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,
Petitioners,

vs.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and THE CITY OF ST. LOUIS,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS

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No. 93-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

vs.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and THE CITY OF ST. LOUIS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS THOMAS A. VILLA, BOARD OF ALDERMEN OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS

Respondents Thomas A. Villa, Board of Aldermen of the City of St. Louis, and The City of St. Louis respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 999 F.2d 1301 (1993).

JURISDICTION

As petitioner states, the court of appeals denied petitioners' petition for rehearing on November 1, 1993. On January 25, 1994 Justice Blackmun signed an order extending to February 15, 1994 the time in which to file a petition for writ of certiorari. Then petitioner Sharon Tyus, but not the other petitioners,[1] filed an Application for Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, which application was granted on February 8, 1994, extending the time to and including March 1, 1994. Thereafter the petition now under consideration was filed. The Court has jurisdiction of the petition, insofar as it was filed by Sharon Tyus, but it does not have jurisdiction over the claims of her co-petitioners - Freeman Bosley, Sr., Bertha Mitchell, Irving Clay, Jr., and Claude Taylor - because the time expired for the filing of a petition by any of them.

STATEMENT OF THE CASE

In January, 1992 the African American Voting Rights Legal Defense Fund, Inc., a black citizens' organization, and 16 black voters in the City of St. Louis filed suit in the United States District Court for the Eastern District of Missouri against Thomas A. Villa, President of the Board of Aldermen of the City of St. Louis, Vincent C. Schoemehl, Mayor of the City of St. Louis, and the Board of Aldermen, City of St. Louis. Plaintiffs attacked the recently approved ordinance of the City that had redistricted the City's twenty-eight wards. Plaintiffs alleged that the Board of Aldermen had been presented with a plan that would have drawn 14 wards with a 65% black majority, but had rejected that plan in favor of a plan with only 12 wards with a 65% black majority, and that the plan thus violated section 2 of the Voting

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[1] The application that was granted on January 25, 1994 was not served on respondents, and thus respondents do not know who joined in that application.

Rights Act, the Fourteenth Amendment, and other constitutional provisions (9, 11, 14-15).[2]

The City of St. Louis intervened as a defendant, and, in due course, the defendants answered. Admitting that there had been some acts of private and public discrimination in the City's long history (22), that wards could have been drawn in such a way that there would have been 14 wards with a majority black population (*id.*), and admitting that voting in the City, and within some wards, had, on some occasions, been racially polarized (22-23), defendants denied plaintiffs' allegations that, if the wards had been redistricted fairly and without discriminatory affect, blacks would constitute an effective voting majority in at least 14 wards (10, 21), and that the purpose of the redistricting plan was to abridge the right of blacks to vote (*id.*). They also plead that section 2 is unconstitutional if construed as plaintiffs urged (23-24).

Defendants then moved for summary judgment. They established, by affidavit, that the white population of the City is 50.9% of the total population (43), that the black population is 47.5% of the total population (*id*), that the white voting age population is 55.8% of the total voting age population (*id.*), that the black voting age population was 42.7% of the total voting age population (*id.*), and that the 1991 redistricting plan "will elect" 12 black aldermen (35). This is proportional representation, measured by voting age (32, 53). They further established that there had been rough proportional representation of black voters by voting age since at least 1971 (33-35).

Plaintiffs' response controverted none of these facts (84-94). Indeed, their expert complained that blacks had been packed into 12 wards (86, 88), agreed that blacks have an effective voting majority in wards when the total population is 65% black or the

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[2] References are to the appendix to appellants' brief in the Eighth Circuit.

voting age population is 60% black (87), asserted that it is possible to draw wards in such a way that there would be 14 wards with a 65% black majority (89), and argued that proportional representation should be assessed by total population, not by voting age population (90-91).

On June 17, 1992 the court entered summary judgment in favor of the defendants. The district court found that the redistricting plan provided for 12 wards in which black voters "should be able" to elect representatives of their choice, found that this constituted proportional voting age population representation, found that there had been such representation since at least 1971, and noted that plaintiffs failed to point to any special circumstances that would demonstrate that this success does not accurately reflect the ability of blacks to elect their preferred representatives. Petition for Writ of Certiorari, B-8. Plaintiffs then filed a motion to alter or amend the judgment (142), together with an affidavit in support (142, 213).[3] The district court, finding it inappropriate to reconsider the judgment based on an amended factual record since the plaintiffs had failed to show any reason why the evidence there presented could not have been produced at an earlier time, Petition for Writ of Certiorari, C-3, overruled the motion. *Id.*, C-4.

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[3] Many of the citations to the record contained in petitioners' petition are to this rejected post-judgment affidavit (159-213), not to the summary judgment record (1-94). Other citations purport to be from the summary judgment record, but find no support there or anywhere else. In an effort to abide by the command of Rule 15.3 that a brief in opposition be as short as possible, with a belief that the many distortions in the petition do not have a bearing on what would properly be before the Court if certiorari should be granted, see Rule 15.1, and with an expectation that the Court will readily notice the vast discrepancy in the case described by petitioners and that described by the district court in its judgment and post-judgment order, respondents have decided not to expose each misrepresentation. Lest there be any misunderstanding, however, respondents do not concede the truth of any of the "facts" set forth in the statement of the case, the argument, or any other section of the petition for writ of certiorari.

Five of the 17 plaintiffs appealed to the Eighth Circuit, which affirmed the district court's well-reasoned memorandum. *Id.*, A-3. A petition for rehearing was denied, as well as a suggestion for rehearing en banc. *Id.*

REASONS FOR DENYING THE WRIT

I.

THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS, WHO ARE NOT RESIDENTS OF THE WARDS WHERE THEY CLAIM THAT THERE IS VOTE DILUTION, DO NOT HAVE STANDING TO PRESENT THAT CLAIM.

Petitioners (and others) brought suit alleging that blacks in the City of St. Louis have less opportunity to elect representatives of their choice than do whites. This is, on its face, an incredible proposition: two-thirds of the City's city-wide elected municipal officials are black, including the City's mayor,[4] and for several decades the City's board of aldermen has had black members in rough proportion to the voting age population of the City that is black. But the plaintiffs believed that the Voting Rights Act requires that ward boundaries be gerrymandered to establish the maximum number of black controlled wards, and the boundaries were not. (32-36).[5] The district court found that the summary judgment record confirmed what intuition suggests, and the court concluded, as had a three-judge panel that had recently considered the question of whether blacks have an opportunity equal to that of whites to elect state legislators in the City of St. Louis, see *Nash v. Blunt*, 797 F.Supp. 1488 (W.D. Mo. 1992), affirmed *sub. nom. African American Voting Rights Legal Defense Fund, Inc. v. Blunt*, 113 S.Ct. 1809, 123 L.Ed.2d 441 (1993), that blacks do have an opportunity equal to that of whites to elect representatives of their choice in the City of St. Louis. When some of the plaintiffs appealed, the judgment was af-

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[4]The City of St. Louis has three city-wide elected municipal officials. The mayor and the comptroller are black; the president of the board of aldermen is white.

[5]Plaintiffs plead that there could have been more black dominated wards than there are; thus the Voting Rights Act was violated (14-15).

firmed by the Eighth Circuit. Now the petitioners petition this Court for a writ of certiorari.

Petitioners have now identified certain wards where they claim that black voters lack an equal opportunity to elect representatives of their choice: the 2nd, 6th, 7th, 8th, 17th, and 25th wards. Petition for Writ of Certiorari, pp 18-19. With respect to the 2nd Ward, this claim is inconsistent with their position in the district court, where their expert characterized the 2nd Ward as a black ward (89), and, indeed, complained that black voters had been "packed" into that ward (88). But, in any event, the only persons who have standing to claim that the votes of black voters in the 2nd, 6th, 7th, 8th, 17th, and 28th wards have been unlawfully diluted are, of course, black voters in the 2nd, 6th, 7th, 8th, 17th, and 28th wards. But Sharon Tyus, the only petitioner who has filed a timely petition, is a voter in the 20th Ward (4). As for her out-of-time co-petitioners, Freeman Bosley, Sr. is a voter in the 3rd Ward (3), Bertha Mitchell is a voter in the 4th Ward (*id.*), Irving Clay, Jr. is a voter in the 26th Ward (4), and Claude Taylor is a voter in the 27th Ward (*id.*). Thus they lack standing, and it is not likely that the Court will reach the questions presented by their petition.

II.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THIS COURT'S DECISIONS IN *GINGLES* AND *VOINOVICH*.

Petitioners first argue that the decisions below conflict with this Court's decisions in *Thornburg v. Gingles*, 478 U.S. 30, 92 L.Ed.2d 25, 106 S.Ct. 2137 (1986) and *Voinovich v. Quiller*, 507 U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993), and therefore this Court should grant their petition. But they do not, so the Court should not.

It takes a little work to ascertain why petitioners think that the decisions below conflict with *Gingles*, but it appears to be this: petitioners think that the courts below regard *Gingles* as making proportional representation an absolute bar, Petition for Writ of Certiorari, p. 9, while *Gingles* actually recognizes that special circumstances can relax that bar. *Id.*, pp. 11-12. But, in fact, the courts below explicitly recognized that special circumstances could rebut the presumption arising from the history of proportional representation, noting that plaintiffs had failed to point to any such circumstance. *Id.*, B-8. So there is no conflict with *Gingles*.

It also takes a little work to understand why petitioners think that the decisions below conflict with *Voinovich*, but it appears to be this: petitioners think that *Voinovich* regards "packing," that is, placing more voters of a particular race in a district than are necessary to control the district, and "cracking," that is, placing significant numbers of voters of a particular race in a district that they are unable to control, as unlawful vote dilution. This is a misunderstanding of *Voinovich*. In fact, what the Court said is that "[i]n the context of single-member districts, the usual *device* for diluting minority voting power is the manipulation of district lines." *Voinovich*, 122 L.Ed.2d at 511 (emphasis added). The Court went on and described cracking and packing as the two most prominent techniques for manipulating district lines. *Id.* But the Court nowhere defined cracking or packing as vote dilution per se rather than as devices for achieving that dilution. Just a moment of reflection shows why.

If one cannot place more voters of a particular race in a district than are needed to control the district, and if one cannot place fewer voters of a particular race than are needed to control the district, then one must place the optimum number of voters of that race in every district. If, for example, 60% of the voting age population of a district gives voters of a particular race control of a district, then, to avoid the twin evils of packing and cracking,

the districts must all be drawn in such a way that each district contains the optimum 60% level. It is not possible that the law requires that.

First, in each such district, voters of other races will necessarily be cracked - there will be significant numbers of voters of other races, but they will be unable to elect representatives of their choice. Therefore, the notion that cracking is, per se, vote dilution is self-contradictory. The fact is that some voters will always be packed and that some voters will always be cracked. The present case is a case in point.

There are significant populations of white voters in the 2nd, 5th and 19th wards (56), all of which are "safe" black wards. So the white voters in those wards have been cracked. Whites are also subject to packing. If the experts on both sides are right, and it takes 60% voting age population for black voters to control a ward, a ward will be controlled by white voters if white voters make up 45% of a ward's voting population. Thus, giving a safety margin of 5%, packing of white voters occurs when wards are given a white voting age population of more than 50%. By that criterion, white voters are packed in sixteen wards (56). By the same logic, packing of black voters occurs when more than 70% of the voting age population is black. By that criterion, black voters are packed in only ten wards (*id.*) If packing and cracking are per se vote dilution, it is white voters, no less than black voters, who have had their votes diluted. And it makes no sense to say that everybody's votes have been diluted.

Second, drawing districts in such a way as to avoid packing or cracking of voters of a particular race necessarily means that voters of that race will control the maximum number of wards that their numbers permit. But the Court has already held that the Constitution does not permit districts to be gerrymandered to provide a racial minority with proportional representation. *Shaw v. Reno*, 509 U.S. ___, 125 L.Ed.2d 511, 113 S.Ct. 216 (1993).

If the Constitution cannot allow that, it cannot allow a gerrymander to provide a race with the maximum number of districts, an even more ambitious claim.

III.

THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE DECISIONS BELOW AND THIS COURT'S DECISIONS IN *CITY OF RICHMOND V. UNITED STATES* AND *SHAW V. RENO.*

In the second section of their argument petitioners say that the decision below is inconsistent with the Court's decisions in *City of Richmond v. United States*, 422 U.S. 35, 45 L.Ed.2d 1, 95 S.Ct. 2091 (1975) and *Shaw v. Reno*, *supra*, and with unidentified circuit court of appeals' decisions. The idea seems to be that not only can a section 2 claim be based on effect without intent, such a claim may also be based on intent without effect. It would be odd if petitioners were right about this: if a prejudiced jurisdiction adopted a voting device with the expectation that the defect would adversely affect one race, but, in practice, it adversely affected the other race, why would one enjoin the device at the behest of a member of the race that derived the benefit of that device? It would be no different than a hypothetical case where a bigoted employer adopted an entry-level test that he expected disproportionate numbers of green people to fail, and did so for the purpose of excluding green people from employment with his business. If the employer miscalculated, and non-greens ended up failing the test in disproportionate numbers, with the result that non-greens, not greens, were excluded from employment, there is no reason why such a test should be held to have unlawfully discriminated against greens, despite the bad motive.

Not surprisingly, it is hard to find cases discussing petitioners' theory. Closest, perhaps, is *Hunter v. Underwood*, 471 U.S. 222, 85 L.Ed.2d 222, 105 S.Ct. 1916 (1985), a Fourteenth Amend-

ment voting rights case, where the Court held that a voting restriction, initially adopted with an illicit purpose, was invalid because "its original enactment was motivated by a desire to discriminate against blacks on account of race *and the section continues to this day to have that effect.*" *Id.*, 471 U.S. at 233 (emphasis added). Since then, district courts have relied on *Hunter* for the proposition that section 2 of the Voting Rights Act requires an effect, whatever the purpose. *Brown v. Board of Commissioners of the City of Chattanooga, Tennessee*, 722 F.Supp. 380, 389 (E.D. Tenn. 1989); *Dillard v. Baldwin County Board of Education*, 686 F.Supp. 1459, 1467 (M.D. Ala. 1988).

There is nothing in either *Richmond* or *Shaw* to the contrary. *Richmond* was a section 5 case, not a section 2 case. This is critical because section 5 explicitly requires, in determinations made pursuant to that section, that changes in the voting practices regulated by that section be determined not to have the illicit purpose *and* that they be determined not to have the illicit effect, while section 2 says nothing of the sort. Compare 42 U.S.C. §1973c with 42 U.S.C. §1973. Therefore *Richmond* lends no support at all to petitioners' claim. Quite the contrary is true.

Neither does *Shaw*. *Shaw* was concerned with the limited, extreme case where a redistricting scheme is so bizarre, so irrational on its face that it can only be understood as an effort to segregate voters into separate voting districts because of their race, without justification. *Shaw v. Reno, supra*, 125 L.Ed.2d at 536. Here petitioners admit that the City's redistricting plan does not come under the *Shaw* standard. Petition for Writ of Certiorari, p. 24. So the opinion below cannot be inconsistent with the decision in *Shaw*. Indeed, there is language in *Shaw* that contradicts petitioners' theory: *Shaw* describes voting practices as violating the Fourteenth Amendment "when they are adopted with a discriminatory purpose *and have the effect of diluting minority voting strength.*" *Shaw*, 125 L.Ed.2d at 524 (emphasis added).

IV

THE PETITION SHOULD BE DENIED BECAUSE THE CLAIMED SPLIT BETWEEN DISTRICT COURTS DOES NOT JUSTIFY GRANTING A WRIT OF CERTIORARI.

In the third part of their argument petitioners assert that the Court should grant certiorari to decide whether proportionality should be determined on the basis of voting age population or upon the basis of total population, an issue on which the "lower courts" are split. But all of the lower courts that petitioners point to as courts that have rejected voting age proportionality in favor of total population proportionality are district courts, not courts of appeals, and it is conflicts between courts of appeals, not a district court and a court of appeals, that are appropriate for certiorari. See Supreme Court Rule 10. Moreover, at least one of the cases petitioners cite as a case that uses total population also uses voting age population. See *Barnett v. Daley*, 835 F.Supp. 1063, 1067 (N.D. Ill. 1993); 809 F.Supp. 1323, 1329 (N.D. Ill. 1992). Beyond this, none of the district court opinions petitioners cite *rejects* use of voting age, although, to be sure, they use total population.

This Court recently and pointedly noticed that courts, in determining whether a Voting Rights Act violation has occurred, have looked to voting age population, and further noticed that the Court itself had repeatedly referred to the voting population in its own opinion in *Gingles*. *Growe v. Emison*, 507 U.S. __, 122 L.Ed.2d 388, 403 n.4., 113 S. Ct. 1075 (1993). The most recent cases - the case at bar and *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F.Supp. 453, 463 (W.D. Tenn. 1993) - recognize voting age population as the superior measure, and it is. It is the superior measure because it is the measure more directly related to the language of section 2 itself, which language prohibits that which results in the denial or abridgement of the *right to vote*, see 42 U.S.C. §1973(a), a right possessed by *voters*.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 15 1994
OFFICE OF THE CLERK

No. 93-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS, MISSOURI,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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No. 93-1394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS, MISSOURI,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

By casting doubt on plaintiffs' facts,[1] ignoring the nature of their claim, and failing to recognize that different analytic frameworks are required for different electoral practices, Respondents' brief in opposition attempts to skirt the conflict between the lower courts' holding that "proportional representation" bars plaintiffs' challenge to St. Louis' single-member, multi-district electoral plan and the analytic framework evolved by this Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993). Rather than make this conflict go away, respondents' presentation highlights the need for this Court to clarify the analytic framework for proving a §2 challenge to a single-member, multi-district plan.

I. PETITIONER SHARON TYUS, AN AFRICAN AMERICAN REGISTERED VOTER AND RESIDENT OF THE CITY OF ST. LOUIS, HAS STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP.

As a threshold matter, respondents argue that Petitioners, including Petitioner Sharon Tyus, an African American

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[1] Respondents imply that petitioners misstate the facts, but decline to identify a single purported misstatement by hiding behind this Court's admonition in Rule 15.3 that a "brief in opposition shall be as short as possible." Their tactic contravenes the proviso of Supreme Court Rule 15.1 that respondents "address any perceived misstatement" not merely suggest one exists. In truth, there are no misstatements. The facts are detailed in an eleven page affidavit filed in opposition to respondents' summary judgment motion (App. 84-95) and in a more elaborate submission in support of plaintiffs' Rule 59(e) motion (App. 159-213). Both sets of papers and exhibits are part of the record on appeal. *See Foman v. Davis*, 371 U.S. 178, 181 (1962); *Figgie Intern, Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). These facts, as summarized in the petition (18-19, n. 13-15) were presented in virtually identical fashion in the briefs below. They were never addressed, let alone rebutted, by respondents or their expert. Indeed, respondents have argued from the very beginning, and the lower courts have accepted, the proposition that "proportional representation" renders plaintiffs' facts irrelevant.

registered voter and resident in the 98.9% African American majority 20th ward, lack standing to challenge St. Louis' race-based reapportionment plan under §2 of the Voting Rights Act.[2] (Respondents' Brief 7; hereinafter "RB"). According to respondents, the only African Americans to be harmed by the 1991 St. Louis reapportionment are those who have been fractured into wards with effective white majorities, i.e., African Americans in the 2nd, 6th, 7th, 8th, 17th and 28th wards (RB 7). Since Petitioner Tyus is not among the African Americans "fractured" into these specific wards, respondents argue, she lacks standing to challenge the 1991 map. Respondents' argument evinces a deliberately crabbed construction of plaintiffs' claims and a misunderstanding of the application of standing to voting rights claims.

Plaintiffs contend that the 1991 Ward map dilutes the voting power of African Americans generally, throughout St. Louis, and that its boundaries were manipulated to frustrate the electoral opportunities of a politically cohesive African American community (App. 9-10). Specifically, plaintiffs' claim that the 1991 ward boundaries were manipulated with the purpose and effect to "fracture," "pack," and reduce African American population in specific wards while maximizing the voting power of the white community (Petition, 18-19, n. 13-15). Petitioner Tyus stands as an individual victim of this dilutive effect since her ward's boundaries were drawn to "pack" herself and other African American voters into a ward where African Americans constitute an excessive majority (98.9%), thus wasting their votes and depriving them of any influence in other wards.

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[2] Respondents question the jurisdiction of this court over the Petitioners other than Petitioner Tyus. Without conceding their point, we note that respondents do not question this court's jurisdiction over Petitioner Tyus. As we explain, Petitioner Tyus has standing to pursue this matter alone.

Voinovich, 113 S.Ct. at 1155; *Shaw v. Reno*, 113 S.Ct. 2816, 2835, n.6 (1993) (White, J., dissenting). Furthermore, the impact of this boundary manipulation extends beyond her particular ward, because the configuration and racial composition of Ms. Tyus' ward necessarily impacts the configuration of other wards, particularly the contiguous second ward and nearby central corridor area. The "packing" of Ms. Tyus and other African Americans into the 20th ward at 98.9% was essential to respondents' efforts to contain African Americans in only 11 wards, or the fewest number possible.[3] As an African American resident and registered voter in one of St. Louis' "packed" wards, petitioner Tyus has suffered a distinct and palpable injury and she has standing to challenge the map. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *Arlington Heights v. Metro Housing Corp.*, 429 U.S. 252, 263 (1977).

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[3] Respondents incorrectly suggest that petitioners' claim that the 2nd Ward should not be treated as an African American ward and, therefore, that there are only 11 wards in which African Americans can elect their candidates of choice is at odds with their position below (RB 7). In fact, this is one of the "genuine issues of material fact . . . making this case wholly unsuited for summary judgment" (A-3, McMillin, J., dissenting). Plaintiffs *never* suggested that African Americans could elect their candidate of choice in the 2nd Ward. Indeed, they pointed out that in a recent bi-racial election the candidate supported by the white community defeated the candidate preferred by the African Americans (Petition, 5 n. 6). In fact, plaintiffs argued below that a thorough analysis of voting behavior was required before the 2nd Ward could be designated as an African American Ward. *See Growe v. Emison*, 113 S.Ct. 1075, 1085 (1993); *Campbell v. Theodore*, 113 S.Ct. 2954 (1993) (Government's brief at 14 and 25; n. 11); Petition, 14 n. 9.

II. RESPONDENTS' ATTEMPT TO RECONCILE THE LOWER COURTS' DECISIONS WITH *GINGLES* AND *VOINOVICH* SERVES TO HIGHLIGHT THE NEED FOR THIS COURT TO CLARIFY THE ANALYTIC FRAMEWORK FOR §2 CHALLENGES TO SINGLE-MEMBER, MULTI-DISTRICT ELECTORAL PLANS.

The lower court's holding that "proportional representation" in the single-member, multi-district context bars a §2 claim[4] cannot be reconciled with the approach taken by this Court in *Gingles* and *Voinovich*. The lower courts' conclusion, derived from their reading of *Gingles*, is premised on the mistaken belief that the presence of "proportional representation" in a single-member plan is the sole and conclusive measure of vote dilution. In other words, proportional representation—and not equal opportunity—is the lode-star of the Voting Rights Act. Consequently, "proportional representation" serves as a ceiling quota on African American representation, and the courts are free to turn a blind eye to

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[4] Respondents take issue with petitioners' assertion that the lower court's opinions treat "proportional representation" as a complete bar to single-member, multi-district claims because "the courts below recognized the special circumstances exception but concluded that plaintiffs had failed to point out any such circumstances" (RB 8). Respondents are only half right. The lower courts paid lip service to the "special circumstances" exception, but did not share their analysis of its application to single-member plans. The lower courts clearly rejected "boundary manipulations" that "fracture," "pack" or "reduce minority population" as special circumstances that explain why, in a single-member plan, proportional representation does not accurately reflect African American voting power (See Petition, 10 n. 16). Instead, the court must have accepted respondents' argument that only the factors identified by this Court in *Gingles*, 478 U.S. 57, n. 25, could qualify. Since the examples of special circumstances identified in *Gingles* are relevant only in the multi-member district context, the effect of the lower courts' ruling is to eliminate the "special circumstance" exception in the single-member, multi-district context and to make "proportional representation" an absolute bar.

discriminatory devices used to accomplish that bottom line. This conclusion is totally inconsistent with the analytic framework for voting rights claims articulated by this Court.

Vote dilution has been consistently defined by this Court as the "impermissible discriminatory effect that a multi-member or other districting plan has when it operates to 'cancel out or minimize the voting strength of racial groups.' " *Gingles*, 478 U.S. at 87 (O'Connor, J. concurring), *quoting White v. Registar*, 412 U.S. 755, 765 (1973). In addition to the "submergence" of minority voters through the use of a multi-member district mechanism, vote dilution may also occur through the manipulation of district boundaries. As Justice O'Connor noted in her concurrence in *Gingles*, 478 U.S. at 87, in a single-member district context, "the way in which district lines are drawn can have a powerful effect on the likelihood that members of a geographically and politically cohesive minority group will be able to elect candidates of their choice." Indeed, "in the context of single-member districts, the usual devise for diluting minority voting power is the manipulation of district lines." *Voinovich*, 113 S.Ct. at 1155. Neither the use of the multi-member districting scheme, nor the manipulation of single-member district lines, is *per se*, illegal. When, however, either device operates unequally to cancel out or minimize the voting strength of a racial group it has caused the impermissible discriminatory racial effect of "vote dilution."

According to this Court, in the single-member district context, the discriminatory effects that can be caused by boundary manipulation include "fracturing" and "packing." "Fracturing" occurs when

> a politically cohesive minority group that is large enough to constitute the majority in a single-member district [is] divid[ed] . . . among various districts so

> that it is a majority in none . . . [and] the majority in each votes as a bloc against the minority candidate.

Voinovich, 113 S.Ct. at 1155. "Packing" occurs when African American population, that could form an effective majority in a number of districts is "concentrated . . . into [fewer] districts where they constitute an excessive majority." *Ibid.* "Packing" and "fracturing" are not mere "devises" that can cause dilution (RB 8). They are the very essence of vote dilution. Put differently, boundary manipulation is a *device* for diluting minority vote, "fracturing" and "packing" define the discriminatory or dilutive effect.[5]

Fundamental to Respondents', and the lower courts', mechanical application of the *Gingles*' analysis is the con-

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[5] Respondents suggest that this analysis is "self-contradicting" because there are always some voters who will be packed and some who will be fractured (RB 9-10). They miss the point. Of course, any single-member, multi-district plan can result in some minority persons being in a ward where they are not part of an effective majority or in a ward in which more minority persons reside than is necessary to elect candidates of their choice. In voting rights' jurisprudence, however, that alone is neither "fracturing" nor "packing." It becomes "fracturing" or "packing" only when all of the *Voinovich* conditions are met. 113 S.Ct. at 1155. In addition, plaintiffs challenging boundary manipulations in a single-member plan may be required to show that (a) the boundary manipulations impact unequally on the "opportunities enjoyed by black and white voters" *see Voinovich*, 113 S.Ct. at 1155, and/or (b) the claim would not result in another group's underrepresentation in comparison to its total population. *See United Jewish Organizations v. Carey*, 430 U.S. 144, 163 (1977).

Moreover, drawing wards that do not "fracture" or "pack" a particular racial group does not "necessarily mean[ ] that voters of [that] particular race will control the maximum number of wards that their numbers permit" (RB 9). It means that no racial group can maximize its voting strength at the expense of another group.

clusion that, in the single-member multi-district context, proportional representation will serve as an adequate proxy for a minority group's equal opportunity to elect the candidates of its choice. This proposition is factually incorrect. As plaintiffs' evidence shows, the 1991 St. Louis map simultaneously provides for near "proportional representation" measured by voting-age population, while flagrantly diluting African American voting strength. *See also*, Petition 15-17. More importantly, "proportional representation" has never been treated by this Court as a "fourth precondition" that would obviate the need for the searching "totality of the circumstances" analysis demanded by Section 2. As Justice O'Connor made clear:

> I do not propose that consistent and virtually proportional minority electoral success should always, as a matter of law, bar finding a §2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, *on the totality of the circumstances*, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice.

478 U.S. at 104 (Emphasis added).

III. THE LOWER COURTS' CONCLUSION THAT PROPORTIONAL REPRESENTATION BARS A §2 INTENT CLAIM CONFLICTS WITH THE RULINGS OF THIS COURT AND THE SEVENTH CIRCUIT.

Respondents attempt to reconcile the lower courts' treatment of plaintiffs' §2 "intent" claim with the holdings of this Court and other circuits turns on the same disregard for plaintiffs' factual claim and misunderstanding of "proportional representation" that undermines their discussion of plaintiffs' "results" claim. Plaintiffs' uncontroverted evi-

dence establishes that the boundaries of the 1991 St. Louis ward map were purposefully manipulated to dilute African American voting strength. In direct conflict with *Shaw v. Reno, supra,* the lower courts hold that a voting practice which was adopted with a discriminatory purpose (Petition, 24 and n. 18) and which has the effect of diluting minority voting strength (*Id.* at 18-19, and n. 13-15) is nevertheless immune from challenge because the African American plaintiffs have "proportional representation" measured by voting-age population. This holding also conflicts with the Seventh Circuit's analysis in *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 359-60 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993). Even if the lower courts were correct in their holding that a "bottom line" of proportional representation precluded a §2 "effects" claim, plaintiffs' claims of systematic "fracturing" and "packing" would still provide evidence of intentional discrimination "along the way." *Baird*, 976 F.2d at 359-60. If the "results" test is to become nothing more than a test of whether or not "proportional representation" has been achieved—as the lower courts seem to conclude—then this Court's holdings over the past three decades demand that a claim of intentional discrimination remain available to plaintiffs who can make a more particularized showing of purposeful discrimination in the drawing of particular districts.

IV. THE CONFUSION AMONG THREE-JUDGE DISTRICT COURTS CONCERNING THE PROPER POPULATION MEASURE FOR DETERMINING PROPORTIONAL REPRESENTATION NEEDS CLARIFICATION.

Respondents do not deny that the lower courts use of voting-age population as the measure of proportional representation is directly at odds with this Court's use of total population as the proper measure in both *Gingles* (478 U.S.

at 74-77 and n. 35, and 104) and *United Jewish Organization* (432 U.S. at 166). Nor do they deny that the lower courts are in disagreement over the proper population measure. Instead, respondents suggest that (a) the confusion involves district courts and, therefore, is not appropriate for certiorari, and (b) this Court's recent opinion in *Growe*, 113 S.Ct. at 1083 n. 4, suggests that voting-age population is the "superior measure" (RB 12).

Respondents conveniently overlook the fact that this confusion is, with the exception of *Barnett v. Daley*, 835 F.Supp. 1063 (N.D.Ill. 1993), among three-judge district courts whose judgments are final in the absence of Supreme Court review. Three-judge courts hear all §2 challenges to Congressional and state-wide reapportionments. The appropriateness for resolving conflicts among three-judge courts is every bit as great as is the resolving of conflicts among Circuit Courts of Appeal.

Respondents reference to *Growe* highlights the confusion that needs this Court's attention. The issue in *Growe*, as well as the cases cited therein (113 S.Ct. at 1083 n. 4), has nothing to do with the issue of "proportional representation." It concerns the question of which racial or ethnic group, if any, has sufficient population to elect its candidates of choice in a specific district. Everyone agrees that St. Louis reapportioned on the basis of total population. Because total population provides the basis for redistricting, total population also serves as the yardstick for measuring proportional representation. Both the Voting Rights Act and the legislative history to the 1982 amendments to §2 define proportional representation in terms of "population" (Petition 27-28).

Although total population provides the basis for reapportionment and the yardstick by which to measure proportional representation, total population does not, by itself,

tell us whether or not such proportional electoral success *can in fact be achieved* in a single-member district plan. The factual determination regarding which racial or ethnic group, if any, can achieve electoral success within a ward begins with the total population figures for each group within each ward. However, it cannot end there. To determine a group's potential electoral success, a court must conduct a searching analysis that includes not only voting-age figures, but also registration data, turnout data, incumbency situation, political cohesion, racial bloc voting and socio-economic factors. Thus, in *Campbell v. Theodore, supra*, this Court vacated and remanded for reconsideration the trial court's identification of African American opportunity districts as any district with a 55% African American voting-age majority in light of the Government's position that there must be an in-depth analysis of each district that *begins with voting-age population* and includes expert analysis of the extent of the voting polarization as well as "historical voting patterns and election results" (R. 129, Exh. C at 14-15, 11). *See also Growe*, 113 S.Ct. at 1084.

It is only in this context of determining which racial group, if any, has an "effective" majority that "voting-age" population becomes the more "meaningful" population figure.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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